**Rule 13 and Rule 23, Ariz. R. Crim. P.**

**VERDICT – "Necessarily-included offenses" distinguished from other lesser-included offenses……..……..Revised 11/2009**

Rule 23.3, Ariz. R. Crim. P., provides as follows:

Conviction of necessarily included offenses

> Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense. The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury.

There are two categories of "lesser-included offenses" – "necessarily-included offenses" and other "lesser-included offenses." "Necessarily-included offenses" are those offenses that by their very nature are always a constituent part of the greater offense charged. The latter are those in which the charging document describes the lesser offense even though the lesser offense would not always form a constituent part of the greater offense charged. *See* State *v. Caudillo*, 124 Ariz. 410, 411, 604 P.2d 1121, 1122 (1979). "Necessarily-included offenses" are a subset of "lesser-included offenses" -- that is, any necessarily-included offense is a lesser-included offense, but not all lesser-included offenses are necessarily-included offenses. "Necessarily-included offenses" are offenses that are always a constituent part of a greater offense – that is, the lesser offense is composed solely of some, but not all, of the elements of the greater crime. See *State v. Hurley*, 197 Ariz. 400, 403, &13, 4 P.3d 455, 458 (App. 2000); *State v. Griest*, 196 Ariz. 213, 214, & 4, 994 P.2d 1028, 1029 (App. 2000). As the Arizona Supreme Court explained in *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980):

> The words "necessarily included" found in Rule 23.3 are not synonymous with the words "lesser included." An offense may be the lesser included of another offense, but factually, dependent upon the evidence, may or may not

> be "necessarily included" in the greater offense. An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense.

Unfortunately, the published cases have not always clearly distinguished between the two terms; therefore, when reviewing case law in this area, careful analysis is necessary.

Rule 13.2(c), Ariz. R. Crim. P., provides that “Specification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and of all offenses necessarily included therein.” Therefore, an indictment on a greater offense puts a defendant on notice of all lesser-included offenses as soon as he is indicted. *State v. Blakley*, 204 Ariz. 429, 440, ¶ 51, 65 P.3d 77, 88 (2003); *State v. Hutton,* 143 Ariz. 386, 390, 694 P.2d 216, 220 (1985).

Further, because a charge of an offense is also a charge of all necessarily-included offenses, Rule 23.3, Arizona Rules of Criminal Procedure, states that the jury must be instructed on all necessarily-included offenses. Therefore, the verdict forms submitted to the jury must always show every choice of verdict that the jury could return, including guilty and not guilty verdicts on the charged offense and every necessarily-included offense. *State v. Hernandez*, 191 Ariz. 553, 561, ¶ 38, 959 P.2d 810, 818 (App. 1998); *State v. Knorr,* 186 Ariz. 300, 303, 921 P.2d 703, 706 (App. 1996). Still, the court need not provide the jury with specific “not guilty” forms for all lesser-included offenses; it is sufficient if there is a generic “not guilty” form so long as it gives the jury an opportunity to acquit the defendant on every offense. *See State v. Hernandez*, 191 Ariz. 553, 561, ¶ 38, 959 P.2d 810, 818 (App. 1998)

As for those lesser-included offenses that are NOT "necessarily included offenses," case law makes it clear that the court need only instruct the jury on such offenses *if* those offenses are *reasonably supported by the evidence* presented at trial. "A defendant is entitled to instructions on lesser-included offenses if the evidence could support a lesser charge." *State v. Bailey*, 160 Ariz. 277, 281, 772 P.2d 1130, 1134 (1989). "A lesser-included offense instruction is appropriate only if the offense is in fact lesser included and the evidence supports the giving of the instruction." *State v. Cisneroz*, 190 Ariz. 315, 316, 947 P.2d 889, 890 (App. 1997) (*citing State v. Kinkade*, 147 Ariz. 250, 253, 709 P.2d 884, 887 (1985)); *accord*, *State v. Hurley*, 197 Ariz. 400, 403, &13, 4 P.3d 455, 458 (App. 2000). *See also State v. Valenzuela*, 194 Ariz. 404, 406, & 10, 984 P.2d 12, 14 (1999); *State v. Dickens*, 187 Ariz. 1, 23, 926 P.2d 468, 490 (1996); *State v. Wood*, 180 Ariz. 53, 65, 881 P.2d 1158, 1170 (1994).

In other words, lesser-included instructions are proper if the evidence presented would allow the jury to rationally find that, although the State failed to prove all of the elements of the charged offense, the State succeeded in proving all of the elements of the lesser offense. *Valenzuela*, 194 Ariz. at 406, & 10, 984 P.2d at 14; *State v. Malloy*, 131 Ariz. 125, 129, 639 P.2d 315, 319 (1981).

"When the record is such that defendant is either guilty of the crime charged or not guilty, the trial court should refuse a lesser included instruction." *State v. Salazar*, 173 Ariz. 399, 408, 844 P.2d 566, 575 (1992). In *Salazar*, the victim was beaten, dragged from her bed, and strangled to death in her home. Salazar was charged with first degree murder, kidnapping, and burglary. At trial, Salazar admitted entering the victim's home, but denied

having anything to do with her death. The jury found Salazar guilty as charged. On appeal, Salazar argued that the trial court should have instructed the jury on second degree murder. The Arizona Supreme Court disagreed, reasoning that Salazar had never claimed, "I killed the victim, but I did not premeditate killing her." The element of premeditation is the factor that distinguishes first degree murder from second degree murder. The court found that the record would not support a second degree murder instruction because, if the jury had accepted Salazar's version of events, the jury would have returned an outright acquittal rather than convicting him of second degree murder. *Salazar*, 173 Ariz. at 408, 844 P.2d at 575.

Although Rule 23.3 does not say so, it appears that in non-capital cases, the trial court is not ordinarily required to instruct the jury on lesser offenses *sua sponte*, in the absence of any request from either side. When neither side requests such instructions, the trial court need only give such instructions when failure to instruct the jury constitutes fundamental error, either by denying the defendant a fair trial or denying him the opportunity to present a defense. However, when either side requests such instructions, the trial court must instruct the jury on all necessarily-included offenses that are reasonably supported by the evidence presented. *State v. Hurley*, 197 Ariz. 400, 403, & 13, 4 P.3d 455, 458 (App. 2000). In *State v. Cruz*, 189 Ariz. 29, 938 P.2d 78 (App. 1996)[1], the Court

[1] *Cruz* was subsequently superseded by statute as to a self-defense issue; however, the case remains valid law for other purposes. *See State v. Sierra-Cervantes*, 201 Ariz. 459, 461, ¶ 10, 37 P.3d 432, 434 (App. 2001).

of Appeals explained the holding of *State v. Whittle*, 156 Ariz. 405, 406-07, 752 P.2d 494, 495-96 (1988):

> The court [in *Whittle*] held that a defendant waives any objection based on the trial court's failure to *sua sponte* instruct on lesser-included offenses except in two instances. … First, a defendant cannot waive his objection if the offense charged may subject him to capital punishment; the court must instruct on lesser-included offenses supported by the evidence even if not asked to do so by the defendant. … Second, if the failure to instruct constitutes fundamental error by denying the defendant a fair trial or the opportunity to present a defense, lack of objection will not waive the error. … Short of these two circumstances, the court need not instruct on lesser offenses absent a request.

*Cruz*, 189 Ariz. at 33, 938 P.2d at 82 [citations omitted].

When the defendant requests a lesser-included offense instruction, but the trial court refuses to give the instruction, the appellate courts will not reverse absent fundamental error.[2] In *State v. Valenzuela*, 194 Ariz. 404, 984 P.2d 12 (1999), Valenzuela was charged with first degree murder; he admitted shooting the victim, but denied any intent to do so.[3] The trial court instructed the jury on the lesser-included offenses of second degree murder and heat of passion manslaughter. Valenzuela also asked the trial court to instruct the jury on reckless manslaughter, but the trial court refused. The Arizona Supreme Court found that the trial court's failure to give the reckless manslaughter instruction was fundamental

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[2] Fundamental error is error that "reaches the foundation of the case or takes from the defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial." *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994), *quoting State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988).

[3] Valenzuela claimed that he intended to shoot a third person in the shoulder to scare him, but the victim stepped in between Valenzuela and the third person and Valenzuela shot the victim to death by accident.

error and required the Court to reverse the defendant's conviction and remand the matter for a new trial. The Court went on to state:

> In non-capital cases, when the defendant requests a lesser included offense instruction that is supported by the evidence, failure to give it constitutes fundamental error if the failure impedes the defendant's ability to present his defense. … Failure to instruct properly or completely impedes a theory of defense when specific intent has become a key component, or "battleground," of the case, but no instruction concerning it is given by the trial judge. … Disputes over specific intent necessitate giving "full and explicit" instructions to the jury.

*Valenzuela*, 194 Ariz. at 407, & 15, 984 P.2d at 15 (*citing State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (1985)) [citations omitted].

Sometimes a defendant does not want a lesser-included offense instruction, preferring to take the "all or nothing" approach. In other words, as a matter of trial strategy, the defendant may choose to give the jury only the either-or choice of convicting him on the originally-charged offense or finding him not guilty. In *non*-capital cases, the defendant may choose to do so if the State does not request any instructions on lesser offenses. However, in a capital case, when the evidence supports a lesser-included offense instruction and the prosecution wants the jury instructed on any lesser-included offenses, the trial court must instruct the jury on the lesser offenses **even over the defendant's objection**. In *State v. Cruz*, 189 Ariz. 29, 938 P.2d 78 (App. 1996), a capital case, Cruz fired a gun into a group of people, killing one. Cruz was charged with first degree murder and several counts of aggravated assault. The evidence presented at trial was sufficient to support instructions on second degree murder and manslaughter as well as first degree murder, so the prosecutor asked the trial court to instruct the jury on the lesser offenses. 189 Ariz. at 33, 938 P.2d at 82.

Defense counsel in *Cruz* objected to any instructions on lesser-included offenses, but the trial court found that the evidence supported the giving of those instructions and gave them. *Id*. The jury found Cruz guilty of second degree murder and three counts of aggravated assault. On appeal, Cruz argued that the trial court should not have given the lesser-included offense instructions over his objections, citing *State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995). In *Krone*, a capital case, the defendant asked the trial court not to give any lesser-included offense instructions; the State did not request any such instructions; and the trial court did not give any. The Arizona Supreme Court reversed Krone's conviction on other grounds, but then stated in *dicta* that when the defendant in a capital case does not want a lesser-included instruction, the "defendant should not have a lesser included instruction forced upon him." 182 Ariz. at 323, 897 P.2d at 625.

The *Cruz* court rejected the defendant's argument that he could not be forced to have the jury instructed on lesser-included offenses. The *Cruz* Court noted that in *Krone* and in *State v. Rodriguez*, 186 Ariz. 240, 921 P.2d 643 (1996), two cases in which the defendant asked the trial court to instruct the jury solely on first-degree murder, the prosecution did not ask the trial court to give any instructions on lesser offenses. Thus, in both *Krone* and *Rodriguez*, *neither* side asked for any lesser-included offense instructions, and so the trial courts did not instruct the juries on any lesser offenses. The *Cruz* court therefore reasoned that *Krone* and *Rodriguez* do not control the issue of "whether the court must *refuse* to instruct on lesser-included offenses when the state requests those instructions, and the defendant objects." *Cruz*, 189 Ariz. at 32, 938 P.2d at 81 [emphasis in original]. The *Cruz* court held that in capital cases, *State v. Whittle*, 156 Ariz. 405, 752 P.2d

494 (1988) and *Beck v. Alabama*, 447 U.S. 625 (1980)[4], require the trial court to instruct the jury on all lesser-included non-capital offenses supported by the evidence, even if the defendant does not ask for such instructions, and even if the defendant specifically requests the court not to give any such instructions. *Whittle* also held that the trial court's failure to instruct the jury on lesser offenses may constitute fundamental error, even though the defendant did not ask for such instructions, if failure to instruct the jury on lesser offenses denies the defendant a fair trial or the opportunity to present a defense. The *Cruz* court then reasoned:

> If the court abides by [defendant Cruz's] wish and the jury convicts him of first-degree murder, he will argue, as Krone and Rodriguez did, that the court committed fundamental error in not instructing on the lesser offenses, and the state will be denied a possible conviction when the evidence could have supported a conviction for a nonpremeditated killing. Thus, we conclude that in a capital case when the state requests a lesser-included offense instruction, justified by the evidence, the trial court should give it even over the defendant's objection.

*Cruz*, 189 Ariz. at 33, 938 P.2d at 82.

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[4] In *Beck v. Alabama*, 447 U.S. 625 (1980), the United States Supreme Court held that the death penalty may not be imposed after a jury verdict of guilt of a capital offense unless the jury was permitted to consider a verdict of guilt of a lesser included offense, when the evidence warranted an instruction on a lesser offense.